STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RYAN AARON ANTHONEY BOWERS, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MERIDETH BETANCOURT,

Respondent-Appellant,

and

KEVIN BOWERS,

Respondent.

UNPUBLISHED
May 3, 2007

No. 274296
Branch Circuit Court
Family Division
LC No. 06-003459-NA

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KEVIN BOWERS,

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and

No. 274313
Branch Circuit Court
Family Division
LC No. 06-003459-NA

MERIDETH BETANCOURT,

Respondent.

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(l). We affirm.

Respondent-mother first argues that her right to representation by counsel was violated when the trial court failed to appoint counsel at the preliminary hearing. Michigan's court rules provide that a respondent has the right to an attorney in a child protective proceeding at the first hearing at which she appears. MCL 712A.17c(5); MCR 3.915(B)(1). Respondent-mother did not raise this issue in the trial court and, therefore, did not preserve it for appeal. Unpreserved constitutional issues are reviewed for plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Respondent-mother requested counsel at the preliminary hearing. Specifically, she requested counsel when she became confused after being given the opportunity to question the DHS worker. The court acknowledged respondent's request, indicated that it would be granted, but then continued with the preliminary hearing. Respondent-mother's right to cross-examine the worker was affected by the trial court's failure to appoint counsel.

However, the failure to appoint counsel at the preliminary hearing does not require reversal. At the hearing, the trial court indicated that it would revisit the issue, after counsel was appointed, if respondent-mother had any concerns. This never occurred. Further, the purpose of the preliminary hearing was merely to determine whether the interests of the child required further action. *In the Matter of Jones*, 137 Mich App 152, 155; 357 NW2d 840 (1984). Neither jurisdiction nor termination was decided at this point. Well before the time that jurisdiction and termination were decided, respondent-mother was appointed counsel. Indeed, counsel was appointed the day of the preliminary hearing. Thereafter, at the adjudication hearing, respondent-mother's plea admitted many of the facts to which the worker testified at the preliminary hearing. Further, the worker was cross-examined by respondent-mother's counsel at the termination hearing. Under these circumstances, we conclude that respondent-mother's substantial rights were not affected by lack of counsel at the preliminary hearing.

Respondent-mother also argues that she was denied the right to present a witness, Erica Brown, at the preliminary hearing. Respondent contends that Brown had first-hand knowledge of her parenting skills and was in a position to testify that she properly fed and cared for her child. Whether to permit a witness to testify is within the trial court's discretion. *In re Vasquez*, 199 Mich App 44, 50-51; 501 NW2d 231 (1993). Other than a vague reference in the transcripts to a "bystander" asking to "speak," there is nothing to support respondent-mother's position that she wished to present Brown's testimony. More pertinent, it is questionable whether Brown was crucial to respondent-mother's case considering she was never offered as a witness at the time of termination hearing to attest to respondent-mother's parenting skills. Because Brown was never

offered as a witness at the preliminary hearing and because her testimony would not have changed the outcome there was no error requiring reversal.

Respondent-mother next argues that her plea of admission was insufficient to establish jurisdiction. Respondent-mother contends that the trial court erroneously relied on the plea, which essentially admitted facts related to prior child custody proceedings in Utah before Ryan's birth, to establish jurisdiction. We disagree. Under the doctrine of anticipatory neglect, a child may come within the trial court's jurisdiction solely on the basis of the parent's treatment of another child. *In re Gazella*, 264 Mich App 668, 680; 692 NW2d 708 (2005). Abuse or neglect of a subsequent child is not a prerequisite to jurisdiction of that child. *Id.* at 680-681. In this case, by virtue of respondent-mother's plea of admissions, it was undisputed that respondents' parental rights to two other children were previously terminated based upon abuse and neglect. Thus, the trial court did not clearly err when it relied upon the doctrine of anticipatory neglect to establish jurisdiction over Ryan.

Finally, both respondents argue that there was not clear and convincing evidence to support termination of their parental rights. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). We disagree. The trial court terminated respondents' parental rights pursuant to MCL 712A.19b(3)(l), which provides for termination of parental rights if "the parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state." It is undisputed that respondents' parental rights to two other children were terminated in Utah based upon abuse and neglect. Thus, MCL 712A.19b(3)(l) was established. However, respondent-mother argues a prior termination *alone* should not be sufficient for termination of parental right to a subsequent child. Respondent essentially is asking that the Court graft additional language to the existing statute. The statute is without ambiguity, and therefore judicial construction is precluded. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

Furthermore, contrary to respondents' position, the statute does require a showing other than that the parent's rights to another child were terminated. It requires that the best interests of the child not preclude termination. MCL 712A.19b(5). In this regard, the trial court did not clearly err in its best interests analysis. There was no evidence that, despite grounds for termination, termination of parental rights would not be in Ryan's best interests. Respondent-mother had a significant child custody history in Utah. According to the DHS workers, she had not significantly improved her parenting skills after Ryan was born. Although respondent-mother admitted that Utah terminated her parental rights for abuse and neglect, she did not believe that she failed to care for those children. There was a questionable incident involving a "roll" from the bed, which caused injury to Ryan at three weeks of age. Respondent-mother was still smoking, which was dangerous to Ryan's respiratory condition. Further, both DHS workers testified that respondent-mother did not appear committed to her child. With respect to respondent-father, the evidence showed that he was still incarcerated in Utah at the time of the termination hearing, that it would be another four months until his release and at least six months thereafter before he was discharged from a transitional facility and ready to care for his child. Based upon these facts, the trial court did not err when it concluded that there was no evidence that termination of respondents' parental rights would not be in Ryan's best interests.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood